MBT (M) Sdn Bhd v Syarikat Perniagaan Mesra Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO MT1–12–162 OF 2001
SURIYADI J
6 FEBRUARY 2004

Civil Procedure — Appeal — Striking out — Appeal against summary judgment — Whether judgment sum satisfied — Whether appellant being "forced" to pay in full — Whether substratum of the appeal still existed

On 14 August 2001 the respondent had successfully obtained summary judgment against the appellant. The appellant filed a notice of appeal on 20 August 2001. Subsequently, the appellant had also filed a stay application, with the hearing set for 16 November 2001. Wishing to enforce the summary judgment, the respondent obtained an order for sale and seizure against the appellant, whereupon a date was fixed for 12 November 2001 for the seized items to be sold. On hearing that the auction of the seized items had been fixed for 12 November 2001, the appellant had hurriedly written in to the respondent requesting delay of the public sale. The respondent rejected the bare appeal. Not acquiescing to this rejection and unwilling to surrender meekly, the appellant sent a cheque to the respondent as full and final settlement of the matter, but subject to that payment being made under protest, and subject to the outcome of the pending appeal. The respondent had responded that only an unconditional payment would be acceptable. The next day ie 9 November 2001, the appellant wrote in and indicated its willingness to make an unconditional payment as full and final settlement of the matter vide a bank draft. After having received that cheque, the respondent had written in to the court, requesting discontinuance of the pending auction. With the appeal still not withdrawn by the appellant, though payment had been made, the respondent had filed an application dated 17 April 2002 to strike out the appeal, on the premise that the substratum of the appeal had dissipated.

Held, striking out the appeal:

(1) Whether the substratum of the appeal still existed or not, the main consideration was whether the judgment had been satisfied. The satisfaction of the judgment, at the end of the day, would depend on the acceptability of the payment by a court. Any payment must by sheer logic be rejected if it had been made to an unauthorized party. Needless to say, if payments had been made pursuant to illegal cajoling or repugnant means, they also could not be said to have satisfied the judgment, as no court would accept them as genuine (see para 31).

(2) From the conduct of the appellant, the appellant was never without legal advice and had not seen it fit to take up stay proceedings promptly (for reasons known only to itself). Further, only when it was beneficial to its interest had it agreed to make payments unconditionally, as reflected by the exhibits. All the actions were undertaken with eyes wide

open, which were clearly tainted by ulterior motive. If it had not wanted to pay the debt due as per the judgment it could have done so, however much agonized by the knowledge of the sale of the seized items. Regardless of that it could certainly recoup all its losses pursuant to the auction, and be compensated subsequently come the hearing date, conditional on it being successful, not unlike any other cases that are litigated in courts (see para 32).

(3) As for the appellant being 'forced' to pay in full pursuant to the impugned judgment this personal grievance must take a back seat. As it were, with no stay order in existence, it was not a case of the latter being forced to pay but having to comply and satisfy the judgment, as the superior position of the law demands it. Without there being any bar to deprive a successful litigant of the fruits of his diligence and legal rights, the respondent here in term of its juxtaposition, was merely exercising its rights when demanding unconditional payment from the appellant. With the substratum of the appeal gone with the impugned payment, the appellant was thus estopped from carrying on with the proceedings. The matter had to stop somewhere (see paras 34 and 36).

[**Bahasa Malaysia summary**

Pada 14 Ogos 2001, responden telah berjaya mendapat penghakiman terus terhadap perayu. Perayu telah memfailkan satu notis rayuan pada 20 Ogos 2001. Berikutan itu, perayu juga telah memfailkan satu permohonan penggantungan, di mana perbicaraan ditetapkan pada 16 November 2001. Berniat untuk menguatkuasakan penghakiman terus tersebut, responden telah mendapatkan satu perintah penjualan dan penyitaan terhadap perayu, di mana satu tarikh telah ditetapkan pada 12 November 2001 untuk item-item yang disita tersebut dijual. Apabila mendengar bahawa lelongan item-item yang disita telah ditetapkan pada 12 November 2001, perayu dengan segera menulis kepada responden memohon lelongan awam tersebut ditangguhkan. Responden telah menolak rayuan tersebut. Dengan tidak menyatakan persetujuan dengan penilakan ini dan tidak ingin berserah sahaja, perayu telah menghantar sekeping cek kepada responden sebagai penyelesaian penuh dan muktamad tentang perkara tersebut, tetapi tertakluk pada bayaran yang dibuat dengan protes, dan tertakluk kepada keputusan rayuan yang belum selesai. Responden telah menjawab bahawa hanya bayaran tanpa syarat sahaja akan diterima. Keesokan harinya, iaitu 9 November 2001, perayu telah menulis dan menyatakan kesanggupannya untuk membuat bayara tanpa syarat sebagai penyelesaian penuh dan muktamad tentang perkara tersebut melalui satu draf bank. Setelah menerima cek tersebut, responden telah menulis kepada mahkamah, memohon lelongan yang belum selesai tersebut tidak diteruskan. Oleh kerana rayuan tersebut masih belum ditarik balik oleh perayu, walaupun bayaran telah dibuat, responden telah memfailkan satu permohonan bertarikh 17 April 2002 untuk membatalkan rayuan tersebut, atas premis bahawa substratum rayuan tersebut telah dibazirkan.

Diputuskan, membatalkan rayuan tersebut:

(1) Sama ada substratum rayuan tersebut masih wujud atau tidak, perimbangan utama adalah sama ada penghakiman tersebut telah dipatuhi. Pematuhan penghakiman tersebut, akhirnya, akan bergantung kepada penerimaan bayaran tersebut oleh mahkamah. Apa-apa bayaran mestilah secara logik ditolak jika ia telah dibuat kepada satu pihak yang tidak diberi kuasa. Lagipun, jika bayaran telah dibuat berikutan pujukan yang menyalahi undang-undang atau maksud bertentangan, ia juga tidak boleh dikatakan telah mematuhi penghakiman tersebut, kerana tiada mahkamah yang akan menerimanya sebagai asli (lihat perenggan 31).

(2) Berdasarkan tindakan perayu, perayu telah mendapat nasihat undang-undang dan menganggap ia tidak sesuai untuk mengambil prosiding penggantungan dengan segera (untuk alasan-alasan yang hanya diketahui sendiri). Tambahan pula, hanya apabila ia memberi manfaat kepada kepentingannya ia bersetuju untuk membuat bayaran tersebut tanpa syarat, seperti yang digambarkan oleh ekshibit-ekshibit. Segala tindakan telah dilaksanakan dengan mata terbuka, yang dengan jelas telah dicemari oleh niat yang tersembunyi. Jika ia enggan membayar hutang yang tertunggak seperti dalam penghakiman ia boleh berbuat demikian, meskipun amat peka tentang jualan item-item yang disita. Namun begitu, ia sememangnya boleh mendapat kembali semua kerugiannya daripada lelong tersebut, dan boleh diberi pampasan berikutan tarikh perbicaraan, dengan syarat ia berjaya, tidak seperti kes-kes lain yang dilitigasikan di mahkamah (lihat perenggan 32).

(3) Berhubung perayu yang 'dipaksa' membayar penuh menurut penghakiman yang dipersoalkan, kilanan peribadi ini tidak penting. Seperti ia sebelumnya, dengan tiada perintah penggantungan yang wujud, ia bukan satu kes di mana ia dipaksa untuk membayar tetapi setelah dikehendaki mematuhi dan memenuhi penghakiman tersebut, seperti yang dituntut oleh kedudukan tertinggi undang-undang. Tanpa ada apa-apa mengilankan seorang litigan yang berjaya daripada ketekunan dan hak-hak undang-undangnya, adalah semata-mata menggunakan haknya semasa menuntut bayaran tanpa syarat daripada perayu. Dengan substratum rayuan yang lenyap dengan bayaran yang dipersoalkan, perayu oleh itu diestopkan daripada meneruskan prosiding. Perkara tersebut seharusnya diberhentikan pada satu peringkat (lihat perenggan-perenggan 34 dan 36).]

Notes

For cases on striking out of appeals, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1220–1224.

Cases referred to

Alexander v Cambridge Credit Corp Ltd [1985] 10 ACLR 42 (refd)

Baker v Turner [1950] 1 All ER 834 (refd)
Bettinson v Bettinson [1965] Ch 465 (refd)
Clissold v Cratchley and another [1910] 2 KB 244 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd, Re; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 (refd)
Metropolitan Real and General Property Trust Ltd v Slaters & *Bodega Ltd, Regal Property Trust Ltd v Slaters & Bodega Ltd, Freehold & Leasehold Investment Co Ltd v Slaters & Bodega Ltd* [1941] 1 All ER 310 (refd)
Monk v Bartram (1891) 1 QB 346 (refd)
Moorgate Mercantile Co. Ltd v Twitchings [1976[QB 225 (refd)
See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Serangoon Garden Estate Ltd v Ang Keng [1953] MLJ 116 (refd)
South American and Mexican Company, Re, ex p Bank of England (1895) 1 CH 37 (refd)
Sun Life Assurance Company of Canada v Jervis [1944] 1 All ER 469 (refd)
Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd [2000] 3 MLJ 254 (refd)
United Investment & *Finance Ltd v Universal Service Agency* [1965] 2 MLJ 235 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 73,
Limitation Act 1953 ss 6(3), 8
Rules of the High Court 1980 O 46 r 2(1), (3), O 55 r 12, O 56 r 1(4),

Elaine Yap (Rina Noor & Co) for the appellant.
KH Yeo (Azam-Malek & Soh) for the respondent.

Appeal from: Summons No 52–1395 of 2000 (Sessions Court, Klang)

Suriyadi J:

[1] On 14 August 2001, the plaintiff respondent ('the respondent') had successfully obtained summary judgment at the Klang Sessions Court against the defendant appellant ('the appellant'). The appellant being dissatisfied had filed a notice of appeal on 20 August 2001. Subsequently, the appellant had also filed a stay application, with the hearing of the latter set for 16 November 2001. Wishing to enforce the summary judgment the respondent had obtained an order for sale and seizure against the appellant, whereupon a date was fixed for 12 November 2001 for the seized items (exh LAB2) to be sold, a few days before the hearing of the stay application.

[2] In response to that intended auction, the appellant had written in to the respondent to stay all execution proceedings, on the ground of it being premature and unwarranted, in the light of the pending stay application. In reply to that terse request, the respondent had replied in an equally tough way as reflected by LAB4, which reads inter alia as follows:

> … your allegation of 'insufficient time to respond and causing unnecessary confusion' is unfounded and frivolous.

> You will also recall that judgment was pronounced way back on 14 August 2001 when your client was at liberty to file whatever application necessary for stay of execution. If your client chose to wait until 19 October 2001 to file such application, they must put up with the consequences of their own doings.
>
> A judgment properly obtained is valid and enforceable until it is set aside. In the light of the above findings and as there is no good reason why our client should be deprived of the fruits of litigation, our client instructs us that execution shall be proceeded with without further delay until and unless settlement is forthcoming.

[3] The contents of the letter were correct in every factual item, or for that matter the view as regards the respondent's legal rights to enforce the judgment and reap the fruits of its diligence, especially the assertion that an appeal would not as of right prevent the execution of the order.

[4] Returning to the main facts, on hearing that the auction of the seized items had been fixed for 12 November 2001 the appellant had hurriedly written in to the respondent requesting delay of the public sale. Unfortunately the respondent did not take too kindly to this request and thereupon rejected the bare appeal. Not acquiescing to this rejection and unwilling to surrender meekly, the appellant had sent a cheque to the respondent as full and final settlement of the matter, but subject to that payment being made under protest, and subject to the outcome of the pending appeal. The respondent had responded that only an unconditional payment would be acceptable. The next day ie 9 November 2001 the appellant wrote in and indicated its willingness to make an unconditional payment as full and final settlement of the matter vide a bank draft. After having received that cheque, the respondent had written in to the court, requesting discontinuance of the pending auction.

[5] With the appeal still not withdrawn by the appellant, though payment had been made, the respondent had filed an application dated 17 April 2002 to strike out the appeal, on the premise that the substratum of the appeal had dissipated. In the application (encl 6), the respondent had alleged that as an unconditional payment was already made that had satisfied the judgment in full, the appellant thus was estopped from carrying on with the appeal, which was an abuse of the process of the court. The respondent had invited the court to invoke its discretionary powers, pursuant to O 92 r 4 of the Rules of the High Court 1980, when striking out the impugned appeal.

Relevant statutory provisions pertaining to a stay application

[6] Section 73 of the Courts of Judicature Act 1964 reads:

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

[7] Order 56 r 1(4) of the Rules of the High Court 1980 in similar fashion reads:

A Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

[8] As regards appeals from subordinate courts and statutory bodies, O 55 r 12 of the Rules of the High Court 1980 similarly provides that:

B An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order …

[9] The above statutory provisions in crystal clear terms promulgate that an appeal *per se* will not act as a stay of proceedings or disallow the execution of any judgment. For a stay of proceedings or execution to happen the permission of the court must be sought out first. That stay when permitted C by the relevant court, will invariably put a stop or preclude the further conduct of the matter thenceforth ie from the last known stage, which the matter had reached and thereafter. This order of stay, which is discretionary in nature, is primarily meant to prevent undue prejudice occasioned on the opposite party in the event the matter were to proceed on (*Bettinson v Bettinson* [1965] Ch 465*; See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd* D *& Ors* [1995] 3 MLJ 598). A practical reason was supplied by *Halsbury's Laws of England* (4th Ed Reissue) Vol 39 p 386, which rationalized the stay on the following grounds:

E The reason for this practice is the avoidance of the waste of time, the expense and the trouble of having a full trial where the judge's decision may be upset by reason of his ruling on an interlocutory or preliminary issue raised during the hearing.

[10] With the entrenchment of provisions in the like of the above s 73 of the Courts of Judicature Act 1964, O 55 r 12 of the Rules of the High Court 1980 or O 56 r 1, and without any outright interference of courts taking place in the interim, a successful litigant thus may proceed onwards to F enforce the obtained judgment by any means, in the like of a seizure and sale action. Choor Singh J in *United Investment & Finance Ltd v Universal Service Agency* [1965] 2 MLJ 235 in crystal clear terms had said at p 238:

G Every person to whom any sum of money is payable under a judgment is entitled to sue out a writ of seizure and sale to enforce payment thereof unless the court has ordered a stay of execution.

[11] The enforcement on the other hand naturally must subject itself to the precondition that that judgment has yet to be satiated. Even though the general principle of law is that courts are loath to deprive a successful party of the fruits of his litigation, it may do so if convincing special circumstances exist that merit a reprieve of its execution *(Monk v Bartram* (1891) 1 QB H 346*; Serangoon Garden Estate Ltd v Ang Keng* [1953] MLJ 116*; Alexander v Cambridge Credit Corp Ltd* [1985] 10 ACLR 42.

[12] A deeper probing of the law will produce rather interesting insights, in the like of Parliamentarian disapproval of any indolence on the part of the successful party to enforce any judgment. Section 6(3) of the Limitation Act I 1953 (Act 254) clearly penalizes any inactive successful litigant, as an action upon any judgment not brought after 12 years from the date on which the judgment becomes enforceable, may not be permitted to be enforced.

Further, no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due. There are even limitations of certain actions in revenue matters under s 8 of the Limitation Act 1953. Only after leave has been obtained from the court may the penalized litigant proceed with the enforcement of that judgment as reflected generally by O 46 of the Rules of the High Court 1980. Rule 2(1) of the latter order lays down that:

> A writ of execution to enforce a judgment or order may not issue without the leave of the court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order;
>
> (b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;
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> (c) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;
>
> (d) where under the judgment or order any person is entitled to relief subject to the fulfillment of any condition which it is alleged has been fulfilled;
>
> (e) where any moveable property sought to be seized under a writ of execution are in the hands of a receiver appointed by the Court.

[13] In a gist, pursuant to the above provisions a writ of execution to enforce a judgment or order, may not issue without leave of the court where six years or more have elapsed since the date of the judgment or order, or for some other reason as provided above. Even if leave were obtained under O 46 r 2(3), pursuant to the issuance of that writ of execution, such writ must be issued within one year after the date of the order granting such leave, as otherwise that order shall cease to have effect, though without prejudice to the making of a fresh order.

[14] The total sum of the inhibitive provisions of O 46 r 2 is that it will be more advantageous for a successful litigant to comply with an order promptly, rather than to subsequently suffer the indignities of a lapsed order or for some other reason as laid down under the above order, What a successful but inactive litigant has to do to revive an order not only is time consuming but also costly.

[15] With such an inhibitive scenario awaiting a successful litigant for being slow, indolent or overly considerate (and despite the existence of statutory provisions that allows him to execute that order even though an appeal has been filed by the unsuccessful opponent), can one blame the current plaintiff for being proactive in wanting to enforce the obtained judgment? Why risk matters by being charitable?

[16] At the other extreme end of the argument was the allegation of the aggrieved appellant, alleging that payment was made under protest and under pressure. With the prevalence of these two views, it was thus encumbent upon me to preside over the matter, and decide whether the inhibitive predicament of the plaintiff should hold sway over the agonizing position of the defendant or otherwise.

A **[17]** Having pondered over this difficult matter I, had concluded that I should not approach the matter merely on the premise of which party was suffering the most 'pressure', but to consider and scrutinize amongst others, the matter at hand from the point of view of the respective strength, conduct, predicament and legal rights of the contending parties, current law position and not least the equity of the matter. In other words, I had to have **B** a liberal view of the matter and adopt a very wide discretion when facing with the poser. As the doctrine of estoppel had been adverted to by the respondent in its application, I thus had to decide in what way equity could be satisfied, which inevitably meant that I had to look into all the relevant maxims of equity.

C **[18]** To deal with the matter at hand I had to resolve, inter alia, the all important question of whether by so making the impugned payment the appellant was prevented from proceeding with the appeal, as the substratum of the appeal in all tangible reality had been exhausted and spent. The appellant had argued strenuously that it could not be estopped, as never in **D** the first place had it accepted the summary judgment, what with the impugned payment being made under threat of the hammer. It must be borne in mind that the doctrine of estoppel is purely a remedial concept centred on the intervention of the court, with equity and justice as its platform (*Moorgate Mercantile Co, Ltd v Twitchings* [1976] QB 225), It is normally a disability whereby a party is precluded from alleging or proving **E** in legal proceedings, that a fact is otherwise than what was made to appear by the matter giving rise to that disability *(Halsbury's Laws of England* (4th Ed, Reissue) Vol 16.

[19] Currently in a stay application, only two scenarios exist after such application viz either the court allows or disallows it. It is trite that the factor **F** that will be considered by the court before arriving at one of the decisions is whether 'special circumstances' exist that could warrant that stay. In the event courts accept that conditional payments (ie paying under pressure) do exist within the purview of a stay application, then in all likelihood aspiring applicants would not hesitate to make partial payments prior to an application of stay, adverting to that payment as 'special circumstances'. In **G** such a scenario the court would certainly be put in a spot, as to reject that conditional partial payment as 'special circumstances', which in all reality had satisfied part of the judgment, could be quite unreasonable in the circumstance.

[20] In brief, if the argument of the current appellant were not rejected, **H** then the discretion of the court would be eroded seriously. It would follow that if full conditional payment were made, subject to that acquiescence, the concept of estoppel would never be permitted to be invoked by any respondent and hence unable at the earliest of stages to strike out an appeal on the premise of want of substratum.

I **[21]** Having been appraised of the full facts of the case I was quite perturbed by the fact that there were certain disconcerting facets to the behavior of the appellant, in the like of taking up the stay action only after

they had notice of the intention of the respondent wishing to enforce the judgment. It was only after having realized its folly of being inactive, the appellant had thereafter resorted to the desperate act of making the payment to the respondent, albeit its differing view on the effect of that payment. Needless to say at every relevant step of the way, counsel ably represented it.

[22] Regardless of their divergent views, the payment was undeniably an act of complying with the impugned court order, and in the process exhausting the judgment. The appellant's submission that the substratum still existed, as that payment was made under pressure and under extreme circumstances, would tantamount to an act of approbating and reprobating ie in its desire to shift its position.

[23] In the course of the hearing, in its attempt to reject the doctrine of estoppel, the appellant had heavily relied on two cases namely *Baker v Turner* [1950] 1 All ER 834 and *Telekom Cellular Sdn Bhd (formerly known as MRCB Telecommunications Sdn Bhd) v Kabelect Sdn Bhd* [2000] 3 MLJ 254. In the above English case, the owner landlord had let out his dwelling house, which came under the Rent Restrictions Act 1920–1939, to a contractual tenant who thereafter had sub-let one of the rooms. The landlord had subsequently terminated the tenant's contractual tenancy by giving her notice to quit. The matter ended up in the Court of Appeal with the latter's decision favoring the landlord. On appeal the decision was reversed. The House of Lords as regards whether the substratum of the appeal had dissipated, had held that following the decision of the Court of Appeal in the landlord's favour, and despite the tenant's failure to comply with a condition on which a stay had been granted, whereupon the landlord had proceeded to execute the order, did not cause the lis to end or the appeal to abate.

[24] In the course of the deliberation, Lord Porter at p 4 before justifying that the lis was not ended by the levying of execution ie by the landlord obtaining possession of the house had distinguished and discussed two cases. For the first case (*Sun Life Assurance Company of Canada v Jervis* [1944] 1 All ER 469), the House of Lords had agreed that where win or lose the appellant would receive nothing at the end of the day, as there was no living issue between the parties the matter was over. Interestingly enough and not too dissimilar to the first case, as regards the other case, ie *Metropolitan Real and General Property Trust Ltd v Slaters & Bodega Ltd, Regal Property Trust Ltd v Slaters & Bodega Ltd, Freehold & Leasehold Investment Co Ltd v Slaters & Bodega Ltd* [1941] 1 All ER 310, the court had opined that 'the decision depended on the fact that the sum paid was admittedly due ...' It was thus my prognosis that, due to the trend of thought of the House of Lords, *Baker v Turner* was definitely of no help to the appellant, as eventually whether the lis was exhausted or otherwise, must turn on the facts.

[25] The facts in *Telekom Cellular Sdn Bhd* were quite similar to the current case in that the respondent also had obtained a summary judgment

against the appellant. The appellant also had filed a notice of appeal to the judge in chambers. At the same time, the appellant there had applied for a stay of execution of the judgment sum, which was refused by the senior assistant registrar. By a letter the appellant had paid the judgment sum and the interest thereon to the respondent 'in full and final satisfaction of the judgment sum'. The words 'without prejudice' were not written on the letter. On receipt of the payment, the respondent had applied to the judge in chambers to strike out the appellant's appeal against the summary judgment on the ground that the whole substratum of the appeal had been destroyed. The judge had allowed the application and struck out the appellant's appeal. The appellant had thereafter appealed and was successful. The Court of Appeal had decided that the lis was not ended by the payment, because the decision of the appellate court that was yet to be determined, would have affected the substantive rights of the parties. Verbatim NH Chan JCA had opined at pp 263–264:

> In *Baker v Turner,* Lord Porter pointed out that the judgment sum in the *Metropolitan* case was admittedly due because there was no appeal against the judgment. The only application before the court in that case was for a temporary stay of execution so as to allow the defendant time to pay. The position in the present case is very different from the situation in the *Metropolitan* case. Here, in the present case, the appellant has appealed against the judgment and under the Courts of Judicature Act 1964 an appeal does not operate as stay of execution. The lis is not ended by the payment of because the decision of the appellate court would have affected the substantive right of the parties
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> … The appeal on the merits to the judge in chambers from the registrar's decision is, therefore, still undetermined. He has still to decide whether the judgment of the registrar was right or not.

[26] Despite the decision of the above case, where his Lordship Mokhtar Sidin JCA had dissented, a perusal of that case showed that the contending parties had failed to bring to the attention of the court a couple of relevant cases, in the like of the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131. The crux of the appeal yet to be determined was irrelevant in comparison to the dissipation of the substratum of the appeal when full payment was made, as established by the latter case. Lee Hun Hoe CJ (Borneo) there had occasion to opine at p 132:

> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson v Church (No 2)* (1879) 12 Ch D 454, Another example is *that payment of judgment debt would destroy the substratum of the appeal.* (Emphasis added.).

[27] Even though the court did not discuss at all the impugned payment of the judgment debt, it confirmed that once the debt was paid before the appeal was heard, that appeal became spent.

[28] The same legal principle also saw approval in *United Investment & Finance Ltd v Universal Service Agency* [1965] 2 MLJ 235, though in a round about way. In the latter Singapore case the plaintiffs had obtained judgment against the defendants for the sum of $1, 832.13, and costs. The defendants

instead of paying the money to the plaintiffs had instead paid the money into court as they intended to appeal against the judgment. The plaintiffs proceeded to levy execution and the defendants' property was seized under a writ of seizure and sale. The defendants thereupon applied by summons in chambers for the writ of seizure and sale to be set aside, and the property seized to be released, on the ground that the writ was void because it was issued after the plaintiffs had received notice of the payment into court by the defendants for the full amount of the judgment and costs. In the course of the hearing, the case of *Clissold v Cratchley and another* [1910] 2 KB 244 was referred to by counsel for the defendant, with no disagreement being uttered by the court as regards the decision. During the hearing, the defendant's counsel had referred to the following paragraph found in the latter case, which reads:

> It is suggested that, when execution was issued, the judgment against the plaintiff was still in force, notwithstanding that the total amount of debt and costs ordered by it to be paid by the plaintiff had been in fact paid, and a receipt had been given for it by a person authorized to receive the money and give the receipt. It is said that, notwithstanding that fact, there was a still existing judgment which would support the writ of execution, and which was still in force. But common sense, wholly apart from authority, tells one that, when the total amount has been paid which is ordered by a judgment to be paid, the judgment ought no longer to be of any force or effect. But, as it has been argued that a writ of execution is good so long as the judgment under which the moneys have been paid has not in law been set aside, it is convenient to shew the authority for the proposition that, when the total amount of a judgment debt has been paid, the judgment ceases to be of any avail. In *Tebbutt v Holt* (1844) 1 Car & K 280, at p 289, Parke B said, 'The law also is that, if the debt and costs are paid or satisfied, the judgment is at an end'. This judgment is at an end

[29] Despite the strength and clarity of the above statement, Choor Singh J had decided against the defendants, justifying it at pp 237–238 in the following manner:

> In this case there was no order of court authorizing the defendant to pay into court the amount due on the judgment and the payment into court was therefore without authority and improper If it were otherwise, every judgment debtor could delay payment to the judgment creditor by paying the amount of the judgment debt into court
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> …
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> … In my view unless the full amount of the judgment debt is paid to the judgment creditor, … does not deprive the judgment creditor of his rights to seize the judgment debtor's property under Order XL rule 16.

[30] To wind it up, Choor Singh J had ingeniously distinguished the facts in the case of *Clissold v Cratchley* vis-a-vis the one before it, stressing on the factor of authority ie whether the recipient had the power to receive the payment. Apart from the above quotation his Lordship had continued at p 238:

> It must be noted that in that case the debt was paid at the solicitor's country office to the solicitor's clerk *who had authority* to receive the money and to give a receipt.

In the present case the judgment debt was paid into court *without the court's authority.* (Emphasis added.)

[31] From the above two cases, with particular emphasis on the Federal Court case, I was satisfied that to arrive at the conclusion of whether the substratum of the appeal still existed or not, the main consideration was whether the judgment had been satisfied. The satisfaction of the judgment, at the end of the day, would depend on the *acceptability of the payment by a court* To revert to the earlier authorities as examples, any payment must by sheer logic be rejected if it had been made to an unauthorized party as in *United Investment* & *Finance v Universal Service.* Needless to say, if payments had been made pursuant to illegal cajoling or repugnant means, they also could not be said to have satisfied the judgment, as no court would accept them as genuine.

[32] Of the conduct of the appellant, the facts in the current case revealed that the appellant who was never without legal advice, had not seen it fit to take up stay proceedings promptly (for reasons known only to itself). Further, only when it was beneficial to its interest had it agreed to make payments unconditionally, as reflected by the exhibits. All the actions were undertaken with eyes wide open, which were clearly tainted by ulterior motive. If it had not wanted to pay the debt due as per the judgment it could have done so, however much agonized by the knowledge of the sale of the seized items. Regardless of that it could certainly recoup all its losses pursuant to the auction, and be compensated subsequently come the hearing date, conditional on it being successful, not unlike any other cases that are litigated in courts.

[33] It did cross my mind of the scenario of what would happen if the appellant did unsuccessfully apply for a stay, before the judgment was executed by the respondent, followed by full payment though under protest in order to avoid any possible repercussion (like a winding up action). Will the effect be that the substratum of the appeal will also be considered as having dissipated? It is my view that in such a predicament, as the appellant had done the needful to stay the execution promptly but had failed, implying a desire to contest the matter, let alone payment was undertaken under protest indicating further unwillingness, the Court of Appeal's enunciation in *Telekom Cellular Sdn Bhd v Kabelect Sdn Bhd* thus will be highly relevant. On that premise the substratum of the appeal cannot be said to have dissipated.

[34] Returning to the emotive factor of the appellant being 'forced' to pay in full pursuant to the impugned judgment this personal grievance must take a back seat. Needless to say, as far as the law is concerned if the requirements of the Rules of the High Court 1980, eg in the like of a fair copy of the court order having been being served on the appellant have been satisfied, regardless of its sentiments, the appellant was powerless. As it were, with no stay order in existence, it was not a case of the latter being forced to pay but having to comply and satisfy the judgment, as the superior position of the law demands it. Without there being any bar to deprive a

successful litigant of the fruits of his diligence and legal rights, the respondent here in terms of its juxtaposition, was merely exercising its rights when demanding unconditional payment from the appellant.

[35] In the event the views of the appellant *in the context of this case* do make inroads on the legal scene, what with the discretion of the court being whittled away especially in stay applications, and effectively precluding the respondent from adverting to the doctrine of estoppel as a consequence of conditional payments (partial or otherwise) having been made, the legal scene would be in for turbulent times. It certainly would destabilize and cause disharmony with prevailing provisions and settled precedents enunciated by courts. In the process a successful litigant would be the eventual victim, as he would be deprived of the fruits of his labour.

[36] With all the above potential foreboding factors taking a toll on stay applications if I were to agree with the appellant's view, let alone the other conclusions derived from the legal prognosis of connected matters militate against its acceptance, I therefore had no hesitation in rejecting the latter's stance. I had thereupon decided that the appellant's version denying that the payment was voluntarily made was without merit, and with the substratum of the appeal gone it was thus estopped from carrying on with the proceedings. The matter had to stop somewhere. To capitalize on the remarks of Vaughan Williams J in *Re South American and Mexican Company, ex p Bank of England* (1895) 1 CH 37 at p 45:

> The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

[37] How could I not arrive at the inevitable conclusion as, amongst others:

(i) a judgment existed;

(ii) a stay order had not been obtained from any relevant court;

(iii) payment by the appellant was demanded by the law;

(iv) payment had been demanded by the respondent;

(v) the respondent was authorized to accept payment;

(vi) there was no illegal or repugnant act on the part of the respondent when demanding or accepting that payment;

(vii) the appellant could not be said to be uninitiated as it had professional legal advice throughout the proceedings;

(viii) the appellant had expressly admitted that the payment was unconditional;

(ix) to acquiesce to the argument of the appellant that it was forced to pay thus accepting the payment as being flawed, despite all the other prevailing factors, would militate against the rule of good conscience; and

(x) the payment being in full and having satisfied the judgment,

[38] I was satisfied that the substratum of the appeal had dissipated with the impugned payment. I thus had accordingly allowed the respondent's application, and at the end of the day, dismissed the appeal with costs.

Appeal struck out.

Reported by Sally Kee Seok Meng